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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-350

CHARLES R. BUCK, JR., SC.D., SECRETARY OF HEALTH AND MENTAL HYGIENE OF THE STATE OF MARYLAND

Petitioner,

v.

BETTY KIMBLE, HORACE LANCASTER, THELMA EATON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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40

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	6
CONCLUSION	11

TABLE OF CITATIONS

Cases

Aiabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978)	7
Benton v. Rhodes, Nos. 76-263 and 76-306 (S.D. Ohio, May 11, 1976), rev'd 586 F.2d 1 (6th Cir. 1978)	4
Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)	6, 7, 8, 9
Fanty v. Commonwealth of Pennsylvania, 551 F.2d 2 (3rd Cir. 1977)	6, 7
Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1976)	2
Milliken v. Bradley, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977)	8, 10
Quern v. Jordan, ___ U.S. ___, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)	7, 10
Randle v. Beal, ___ U.S. ___, 99 S. Ct. 1497, 59 L. Ed. 2d 770 (1979)	7
Robinson v. Maher, Civ. No. H-76-1 (D. Conn. 1-19-76, unreported)	4, 9, 10
Rothstein v. Wyman, 467 F.2d 226 (2nd Cir. 1972)	8

PAGE

Constitutional Provisions

Constitution of the United States
Eleventh Amendment 2, 6, 8, 11
Maryland Constitution, Art. III § 52 3

Statutes

28 U.S.C., Section 1254(1) 2
42 U.S.C., Section 1396 3
45 C.F.R., Section 205.10(a)(4) 4, 5, 6

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Charles R. Buck, Jr., Secretary of Health and Mental Hygiene of the State of Maryland, who is the successor in office to Neil Solomon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 5, 1979.

OPINIONS BELOW

The Memorandum Opinion of United States District Court for the District of Maryland of November 4, 1976,

is not officially reported and appears as Appendix A. On August 18, 1977, the District Court issued its order with an explanatory cover letter that may be appropriate to be considered in connection with the opinion of the District Court. The cover letter and order appear as Appendix B.

The Opinion of the United States Court of Appeals for the Fourth Circuit, *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979), appears as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 5, 1979. This Petition for Writ of Certiorari is filed within 90 days of that judgment pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Does the judgment of the Court of Appeals, directing the District Court to issue an order requiring the State of Maryland to make future Medicaid payments for services not currently covered under the Medicaid program to those past recipients who did not receive timely notices of reduction in services, violate the Eleventh Amendment to the United States Constitution because it constitutes an award of retroactive monetary relief?

CONSTITUTIONAL PROVISIONS

The Eleventh Amendment of the United States Constitution:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

STATEMENT OF THE CASE

The Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, was established to provide funding for health care to the medically indigent. The State of Maryland has been a participant in the program since its creation in 1965, and it provides matching funds equivalent to the federal share as a requisite of its participation.

In November 1975, the State of Maryland was faced with a projected deficit of 9.7 million dollars in its Medicaid program for the fiscal year ending June 30, 1976. Two responses were made to the deficit to achieve the State's constitutional requirement of a balanced budget. Md. Const. art. III § 52. First, a deficiency appropriation added 6.5 million dollars to the Medicaid budget. Second, the Governor of Maryland directed the Secretary of Health and Mental Hygiene to reduce the scope of services, and it was determined that a reduction was appropriate in some of the optional services.

These reductions were accomplished by changes in the Maryland Medicaid regulations. The reductions included the elimination of non-emergency dental services for persons over 21 years; limiting podiatry services to persons who are diabetic or have lower extremity vascular conditions; limiting eye examinations and eyelgasses for persons over 21 years to one examination every two years and for persons under 21 years to one each year, unless medically necessary; limiting non-prescription drugs to insulin, needles and syringes; requiring a 50 cent co-payment for all prescriptions; limiting inpatient hospital services to those determined to be medically necessary; limiting disposable medical supplies and durable medical equipment; and, requiring a physician's preauthorizia-

tion for non-ambulatory, non-emergency ambulance services.

Notice of the proposed changes was publiished in the Maryland Register on November 12, 1975. The notice included an announcement of a public hearing, which was subsequently held on December 1, 1975. At this hearing approximately 42 persons testified for and against the proposals. The proposed regulations were published in final form in the December 24, 1975, issue of the Maryland Register, to be effective January 1, 1976.

On January 19, 1976, the United States District Court for the District of Connecticut issued an unprecedented decision holding that 45 C.F.R. § 205.10(a)(4) requires that individual notices be sent to recipients before across the board reductions in Medicaid services could be made. *Robinson v. Maher*, Civ. No. H-76-1 (D. Conn. 1-19-76, unreported)[1]. Nether the State of Maryland nor any of its officers or employees was a party in *Robinson*. Nevertheless, Maryland took immediate steps to send individual notices to all Medicaid recipients who faced benefit cuts. Such notices were sent on or before February 1, 1976, to the categorically needy and on or before February 17, 1976, to the medically needy.

The suit by the Respondents was not filed until February 11, 1976. The gravemen of the Complaint was that the Secretary of the Maryland Department of Health and Mental Hygiene, in implementing across the board reductions, had failed to comply with the

[1] On the issue of whether individual notices are required for across-the-board reductions in Medicaid benefits pursuant to 45 C.F.R. § 205.10(a)(4), another district besides Connecticut and Maryland has held that such notices are required. *See, Benton v. Rhodes*, Nos. 76-263 and 76-306 (S.D. Ohio, May 11, 1976), rev'd on other grounds, 586 F.2d 1 (6th Cir. 1978).

notice and hearing requirements of 45 C.F.R. § 205.10 and the due process clause of the Fourteenth Amendment to the United States Constitution. Respondents' initial claims for relief in the suit included a request for an order requiring the Secretary to reimburse members of Respondents' class for all expenditures incurred by them for health care since January 1, 1976, which prior to January 1, 1976, would have been provided by the Medicaid Program.

On November 4, 1976, the District Court held that Petitioner's predecessor had failed to comply with the notice requirements of 45 C.F.R. § 205.10(a)(4) because: 1) individual notices which were mailed on or before February 17, 1976, were not timely; i.e., they were not mailed 10 days before the reductions in services; and 2) the notices did not contain a statement of the reasons for the reductions, a statement of the circumstances under which a hearing could be obtained to challenge the reductions, or notice of the circumstances under which assistance could be continued. However, the Court found that Respondents had no Constitutional or statutory right to a hearing prior to across the board reductions in benefits.

Addressing the question of relief, the Court denied injunctive relief holding that since Respondents had no right to a hearing, it would be "farcical" to order benefits continued until statutory adequate notice was given. However, the Court thought that the payment of expenses incurred by Respondents' class for services previously covered by the Medicaid Program would provide complete relief to them, and it asked Respondents' counsel to prepare an order providing such relief. The Respondents' proposed order required the Secretary to restore all Medicaid services terminated on January 1, 1976, for a period of 58 days. This period represented the period of time from the date of the institution of the reductions through ten (10) days after the last notice

was mailed to a Medicaid recipient. Petitioner's predecessor filed a memorandum of law in opposition to the proposed order, arguing that the Eleventh Amendment barred such relief.

The district court judge concluded that the Eleventh Amendment barred monetary relief other than ordering the Secretary to comply henceforth with the notice requirements of 45 C.F.R. § 205.10(a)(4). This order, requiring future compliance with the notice provisions, was issued on August 18, 1977.

On Respondents' appeal, the Court of Appeals for the Fourth Circuit, on June 5, 1979, vacated the order and remanded the case. In a two to one decision, with a written dissent, the Fourth Circuit purported to fashion relief which would not conflict with the Eleventh Amendment. The remedy devised by the Fourth Circuit requires the State of Maryland to pay, in the future, Respondents' class for expenses for medical treatment that were reimbursable under the pre-1976 regulations. Pursuant to this Order, such benefits shall be paid for a minimum of ten (10) days.

This petition stems from the belief that the relief granted by the Fourth Circuit constitutes, in effect, the precise type of retroactive monetary relief that this Court repeatedly has held violates the Eleventh Amendment.

REASONS FOR GRANTING WRIT

Petitioner asserts two bases for granting the writ of certiorari: 1) that the Fourth Circuit decided a federal question in a way in conflict with an applicable decision of this Court, i.e., *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and; 2) that the Fourth Circuit has rendered a decision in conflict with the decision of another court of appeals on the same matter, i.e., *Fanty v. Commonwealth of Pennsylvania*, 551 F.2d (3rd Cir. 1977), *cert. denied sub nom. Randle v. Beal*, ___ U.S. ___, 99 S. Ct. 1497, 59 L. Ed. 2d 770 (1979). Sup. Ct. R. 19(b).

By vacating the judgment of the District Court, the Fourth Circuit Court of Appeals has decided a federal question in direct conflict with applicable decisions of the Supreme Court. The one paragraph dissenting opinion by Judge Hoffman in this case succinctly describes this conflict:

> If *Edelman v. Jordan*, 415 U.S. 651 (1974), has any continuing vitality, it assuredly would not permit to be done indirectly what it cannot do directly. If the majority opinion in this case is good law, it would result in the complete destruction of the 1974 Supreme Court decision by devising allegedly prospective procedures for the purpose of assuring the payment of retroactive benefits. The majority cites no precedent for its action. It may be fair and equitable in a given case such as this, but to me it is a unique device to avoid the Supreme Court ruling. I would affirm the district court.

Edelman was recently reaffirmed by this Court in *Quern v. Jordan*, ___ U.S. ___, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). This reaffirmation, this Court's decision in *Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978), and the denial of certiorari in *Randle v. Beal*, settle the issue of the continuing vitality of the principles and holding of *Edelman*. The opinion by the Fourth Circuit in the present controversy ignores these authorities and attempts to circumvent the Eleventh Amendment by characterizing as prospective relief that which is, in actuality, a retroactive award for an accrued monetary liability.

1. *The Relief Ordered By The Fourth Circuit Is Compensatory, Not Remedial*

A brief analysis of the relief fashioned by the Fourth Circuit demonstrates why it is, in effect, no different

than the relief found by this Court in *Edelman* to be barred by the Eleventh Amendment. The Fourth Circuit would have the State of Maryland institute a Medicaid program in the future for a minimum of ten (10) days providing for the reimbursement of medical expenses — not now covered — that were covered immediately prior to January 1, 1976. The class of persons eligible for these Medicaid payments would be those persons who are currently eligible and who were eligible for Medicaid on December 22, 1975, and for ten (10) days thereafter.

Such relief requires the direct payment of funds out of the State Treasury, without the State's consent, for a program for which no budgetary appropriation has been made by the General Assembly of Maryland. While the Fourth Circuit has attempted to frame the relief as a prospective injunctive remedy, the substance of the relief is compensatory monetary damages as redress for a past breach of a legal duty. Ordering the State to pay such relief clearly violates the principles enunciated in *Edelman*. *See, Fanty v. Commonwealth of Pennsylvania*, 551 F.2d 2, 5 (3rd Cir. 1977). Although the Fourth Circuit strained to describe the relief it ordered as remedial, it clearly is compensatory. As stated by Judge McGowan in *Rothstein v. Wyman*, 467 F.2d 226, 235 (2nd Cir. 1972) and footnoted in *Edelman*, 415 U.S. at 666,

> "As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear."

It is recognized that some burdens may be placed upon state treasuries ancillary to injunctive relief ordered by a federal court. *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977). However, the remedial payment must be "a necessary consequence of compliance in the future with a substantive federal-question determination." *Edelman*, 415 U.S., at 668. In

the current controversy, all that needed to be ordered to insure future compliance with the "substantive federal-question determination" was (at most, in light of the State's immediate response to *Robinson*) that the State send individual notices to recipients when across-the-board reductions are made in the future, as was ordered by the District Court. Opening the program to the defined class is not necessary to insure future compliance with the notice provisions of the regulations. Therefore, the remedy ordered by the Fourth Circuit is clearly not ancillary to injunctive relief, but rather is compensatory and barred by the Eleventh Amendment.

The Fourth Circuit Court of Appeals did precisely what the District Court was forbidden to do in *Edelman*. As stated in *Edelman*:

> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials. 415 U.S., at 668.

2. *The Relief Ordered By The Fourth Circuit Is Unprecedented*

The State of Maryland was under no court-imposed obligation to issue individual notices for across -the-board reductions at the time of the 1976 cutbacks. When these reductions were made, no court had determined that individual notices were required. The advice of counsel to the Department of Health and Mental Hygiene, which incorporated the existing law, was that individual notices were not required in such situations.

It was not until the decision in *Robinson v. Maher, supra*, by a single judge in another district that any court held that individual notices for such reductions were necessary. After *Robinson* was decided, even though it was not a party to the suit and not bound by its holding, the State proceeded immediately to conform to the standard set down in that case by sending individual notices. Even at the time the notices were sent, the State was under no court-imposed obligation to do so.

As Judge Hoffman correctly noted in his dissent in the present case, the majority cited no precedent for its action. Indeed, the Fourth Circuit went much farther than any of the cases cited in its opinion. In *Quern v. Jordan, supra*, this Court permitted the lower federal court to order notices advising of possible state remedies to be mailed to those persons who were wronged. Such relief was, however, injunctive relief with ancillary mailing costs to the state, and is not analogous to the remedy ordered by the Fourth Circuit in the instant case.

Milliken v. Bradley, supra, another case relied upon by the Fourth Circuit, is inapposite to the present case because the fiscal impact that resulted from it was a necessary consequence of enjoinging state officials to conform their *future* conduct to the requirements of

federal law by requiring the establishment of programs in the Detroit school system for reading, in-service teacher training, testing and counseling. In the case at bar, the monetary relief ordered by the Fourth Circuit is not a necessary or ancillary component of future compliance with the court's injunctive relief. No other case cited by the Fourth Circuit supplies a reasonable precedent for the remedy fashioned by it in the instant case.

To allow the decision by the Fourth Circuit Court of Appeals to stand would have the effect of immediately eroding *Edelman* and related subsequent decisions and would encourage federal courts to mold and shape remedial orders, limited only by the imagination, that substantively violate the Eleventh Amendment, but on their face have been contrived to be prospective in nature.

CONCLUSION

For the reasons stated herein, the Petitioner prays that this Court grant a Writ of Certiorari to review the judgment and opinion of the Fourth Circuit Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX A

In The
United States District Court for the
District of Maryland

Civil No. Y-75-1869

Civil No. Y-76-210

Regenia Jennings

v.

Neil Solomon, Secretary, Department of Health, and Mental Hygiene and Department of Health and Mental Hygiene, State of Maryland

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Betty Kimble, Horace Lancaster and Thelma Eaton

v.

Neil Solomon, Secretary, Department of Health and Mental Hygiene of the State of Maryland

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MEMORANDUM OPINION

(November 4, 1976)

Joseph H. Young, United States District Judge.

The related cases pending herein will be discussed, first, as to the status of each and then as to the merits of the issues raised collectively.

1. *Jennings* — Y-75-1869

The original complaint, and request for a class action, filed on December 9, 1975 were followed by an amended

complaint consisting of nine counts. Count I concerns the freedom of choice of dentists by medical recipients, Count II the notice and hearing provisions of 45 C.F.R. § 205.10, and Count III the alleged failure of the defendant to consult an advisory committee as required by the Social Security Regulations. Defendant has moved to dismiss Count I and for summary judgment as to Count III. The merit of these motions is conceded by plaintiff's counsel in letter dated June 10, 1976, and made a part of this Memorandum Opinion as Exhibit I.

Plaintiff has moved for summary judgment as to Count II (which is also the only open issue on the merits involved in *Kimble*) and plaintiff and defendant have adopted the *Kimble* memoranda in support of, and opposition to, the motion.

2. *Kimble* — Y-76-210

This complaint, and request for a class action, relate to the notice and hearing requirements of 45 C.F.R. § 205.10 (promulgated pursuant to 42 U.S.C. § 1396(a), *et seq.*, and the only open issue involved in *Jennings, supra*). Cross motions for summary judgment are now pending as well as plaintiffs' motion for a preliminary injunction. However, the parties have abandoned resolution of the request for injunctive relief and seek to have the case decided on the cross motions for summary judgment based on a stipulation of facts.

3. *The Relationship Between the Classes*

The *Kimble* class consists of all medical recipients whose benefits of all kinds were reduced by the defendant. The *Jennings* class consists of recipients whose dental benefits were reduced. Thus, the *Jennings* class is a sub-class of *Kimble*. Both classes have moved for certification pursuant to the provisions of Rule 23, Fed. R. Civ. P. By letter dated June 10, 1976 (Exhibit I), plaintiff's counsel in *Jennings* has indicated a willingness to join the *Kimble* class as a plaintiff-intervenor, and seeks separate certification only if the *Kimble* class is not certified.

Defendant's motion to consolidate the cases pursuant to Rule 42(a), Fed. R. Civ. P., is unopposed. Rule 42(a) provides in pertinent part:

> "When actions involving a common question of law or fact are pending before a court . . ., it may order all the actions consolidated."

There are common questions of law and fact at issue since both cases involve the compliance *vel non* of the defendant with the provisions of 45 C.F.R. § 205.10, and the cases are consolidated.

4. *The Open Issue*

As a result of these procedural moves there remains a single class action involving all recipients of medicare benefits. All claims have been eliminated, except the claim that defendant's failure to give notice and a hearing violated 1) plaintiffs' rights under 42 U.S.C. § 1396(a), *et seq.*, as implemented by 45 C.F.R. § 205.10, and 2) their rights to due process under the Constitution. Finally, all parties agree to a disposition of the case on the cross motions for summary judgment and the stipulation of facts.

5. *Class Action Issues*

Although defendant has not objected to the certification of the plaintiffs' class, the jurisdictional question must be considered.

(1) *Are plaintiffs required to comply with the requirements of Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974)?*

The notice required in that case is individual notice to each plaintiff. The cost of notifying 427,000 class members would be prohibitive for these representatives. *Eisen*, it should be noted, concerned a 23(b)(3) class action. Rule 23(c)(2) speaks to the requirement of notice in such actions:

> In any class action maintained *under subdivision (b)(3)*, the court shall direct to the members of the class the best notice practicable under the

> circumstances, including individual notice to all members who can be identified through reasonable effort. [Emphasis added.]

This was the rule interpreted to require individual notice to each member of the class at the expense of the representative. The rule does not speak to the notice requirements in a 23(b)(2) class action. The courts are split on the question of whether such notice is required in a 23(b)(2) class action; *see* Wright and Miller, *Federal Practice and Procedure,* Civil § 1786 n.99 and n.1. The well reasoned weight of authority suggests that it is not. More importantly, the Fourth Circuit has held that the notice requirements of 23(c)(2) apply only to 23(b)(3) class actions, *i.e.,* that 23(b)(2) class actions are exempt. *Gilbert v. General Electric Co.,* 519 F.2d 661 (4th Cir. 1975).

The only remaining question is whether this case qualifies as a 23(b)(2) class action. It does.

Rule 23(b)(2) provides:

> An action may be maintained as a class if the prerequisites of subdivision (a) are satisfied, and in addition . . .
>
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

The present case clearly satisfies this formula. The defendant, "the party opposing the class," acted — by approving across the board medicaid cuts — "on grounds generally applicable to the class."

The requirements of section (a) also appear to be satisfied. It reads in part:

> (4) The representative parties will fairly and adequately protect the interests of the class.

Counsel for the plaintiffs are as competent as the class is likely to find and the named representatives have claims that seem typical of the class.

(2) *Does the action satisfy the jurisdictional amount requirements?*

The plaintiffs have brought suit under 28 U.S.C. §§ 1331 and 1343(3). In order to sue under § 1331, a plaintiff typically must assert a claim in excess of the jurisdictional amount of $10,000. In *Zahn v. International Paper Co.,* 414 U.S. 291 (1973), the Supreme Court held that each member of the class must have a claim exceeding the jurisdictional amount. Aggregation of claims is not permitted, nor is it permissible that only the named representatives have claims over $10,000. On this rule, the instant case cannot be maintained under § 1331, since it is clear that each member of the class does not have a $10,000 claim.

However, in *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974), the Fourth Circuit held that a class action challenging a state officer's actions as inconsistent with federal Social Security Regulations could be maintained on the basis of 28 U.S.C. § 1343(3), which requires no jurisdictional amount.

It should be noted that even if *Blue* is rejected, the plaintiffs will be able to state a claim within this Court's jurisdiction. In addition to the statutory claim, each plaintiff in the class has stated a due process claim under the United States Constitution. Such a claim is clearly covered by § 1343(3). The statutory claim of each plaintiff will, therefore, come within the pendant jurisdiction of the Court, since the Court will already have jurisdiction over the constitutional claim.

6. *The Facts*

The parties have entered into a joint stipulation of facts (Paper # 13). The stipulation is quite broad and covers all the relevant facts. The following is a summary:

Medicaid is a joint federal state program established by Title XIX of the Social Security Act, 42 U.S.C. § 1396(a), *et seq.,* to provide health services to certain low income persons. The State of Maryland has elected

to participate in the program. Defendant Solomon, as Secretary of the Department of Health and Mental Hygiene, has been designated by the Governor as the official responsible for administering the program. By participating in the program and using federal funds, Maryland is bound by all applicable provisions of the Social Security Act and the regulations promulgated thereunder. 42 U.S.C. § 1396(a)(10)(A) requires an electing state to furnish medical services to the "categorically needy" — those who are eligible for AFDC payments (Title IV-A of the Act) and those who are eligible for supplemental security income (Title XVI of the Act). States may also include as recipients the "medically needy" — individuals who, while not eligible for federal cash assistance (as are the categorically needy), have incomes which fall within standards prescribed by the state agency. *See* 42 U.S.C. § 1396a(a)(10)(C). Maryland has elected to provide services for the "medically needy."

Under the medicaid program, the State is required to provide certain medical services to the categorically needy. (*See* 42 U.S.C. § 1396a(a)(13).) Maryland provides the same services to the medically needy. Prior to January 1, 1976, Maryland provided optional coverage for the following services for both the medically and the categorically needy:

> . . . outpatient clinic services, dental services, podiatrist services, optometrist services, emergency hospital services, prescription drug services, non-prescription drug services, physical therapy and related services, medical supplies services, eyeglasses and care for patients 65 or older in institutions for mental diseases and institutions for tuberculosis, institutional services in intermediate care facilities, and care for patients in intermediate care facilities for the mental retarded.

The total number of recipients under the Maryland plan is 427,000 and the combined federal-state cost is estimated at 239 million dollars.

On November 3, 1975, Governor Mandel, citing a projected deficit of 9.7 million dollars in the Medicaid budget, directed the Secretary, in lieu of other alternatives, to reduce the extent of the program's coverage as follows:

A. Limit the coverage of non-prescription drugs to insulin, needles and syringes and require a 50 cent co-payment on all prescriptions.

B. Eliminate all non-emergency dental services for persons over 21 years of age.

C. Limit routine podiatry services to recipients who are diabetic or who have a lower extremity vascular condition.

D. Limit recipients over 21 years of age to one eye examination and one pair of eyeglasses every two years unless waived by the Department as a medical necessity, and recipients under 21 years of age to one eye examination and one pair of eyeglasses each year unless waived by the Department as a medical necessity.

E. Limit inpatient hospital services for recipients to those services determined medically necessary by the Professional Standards Review Organization (PSRO).

F. Limit coverage of disposable medical supplies to certain ostomy and incontinent supplies, needles and syringes and curtail the coverage of durable medical equipment.

G. Require a physician's preauthorization for all non-ambulatory and non-emergency ambulance use.

On November 12, 1975, defendant Solomon caused to be published in the Maryland Register proposed agency regulations setting forth the program reductions to be effective January 1, 1976, and announcing a public hearing to be held on December 1, 1975. On the same day John J. Kent, Jr., Assistant Secretary of the Department of Health and Mental Hygiene, held a press conference in which he announced the proposed

regulations and the date of the hearing, and requested the comments of interested parties. The hearing took place on December 1, 1975; about 42 people testified for and against the proposed regulations. The proposed regulations were adopted as final on December 24, 1975.

On February 1, 1976, the defendant sent summaries of the program changes to all categorically needy recipients (see X-I to the affidavit of James C. Eshelman, which is filed in support of paper # 11). Similar summaries were sent to medically needy recipients on February 17, 1976. No individual notices were sent to recipients prior to January 1, 1976, the effective date of the changes.

7. *The HEW Regulations*

(a) *Notice* (Generally)

The HEW regulations which govern the notice which states must give in cases of benefit reduction are set out at 45 C.F.R. § 205.10. Section (a)(4)(i) provides that:

> (4). In cases of intended action to discontinue, terminate, suspend or reduce assistance:
>
> (i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a)(4)(ii), (iii), or (iv) of this section. Under this requirement:
>
> (A) "Timely" means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective.
>
> (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency

> hearing, and the circumstances under which assistance is continued if a hearing is requested . . .

These regulations have been interpreted to require prior notice to recipients even when the cuts are part of across the board program revisions. *Rochester v. Baganz*, 479 F.2d 603, 606 (3rd Cir. 1973). The opinion cites the argument of the Secretary of HEW, a third-party defendant:

> The Secretary urges that even in cases of across-the-board reductions such advance notice is necessary, or at least appropriate, for the orderly administration of welfare programs. He urges that in a program designed to meet subsistance needs recipients ought to be informed in advance if their payments are to be cut for any reason, so that they may be able to plan for the cut, and to the extent possible adjust to it.

Rochester, supra at 606. Since that decision, the HEW regulations have been augmented (see 38 Fed. Reg. 22005, August 15, 1973) to include the following provision. 45 C.F.R. § 205.10(a)(4)(iii):

> (iii) When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustment shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

In *Robinson v. Maher,* Civil No. H-76-1 (D. Conn., filed January 19, 1976), under facts similar to those now under consideration, the court held that the requirements of the above-quoted section had not been met. Defendant seeks to distinguish *Robinson* and *Rochester* and argues that his department *substantially* complied with the HEW regulations. This argument is based on the fact that the department, in changing the coverage

of the medicaid program, was engaged in the quasi-legislative function conferred on it by Maryland law. In so doing, it was required by state law to publish the proposed regulations in the Maryland Register and to conduct a hearing allowing public comment on the proposed rules. It fully complied with these requirements. The proposed changes were outlined in the Maryland Register of Wednesday, November 24, 1975. Defendant argues that this form of notice constitutes substantial compliance with the requirements of the HEW regulations.

This argument must fail. The language of 45 C.F.R. § 205.10(a)(4) clearly contemplates individual written notice mailed to each recipient. *See* §§ 205.10(a)(4)(i)(A), (B) and 205.10(a)(4)(iii). The notice in the Maryland Register was not mailed to each recipient. Furthermore, it is not couched in language that the typical recipient could possibly understand. The notice in the Maryland Register cannot be viewed as substantial compliance with the HEW requirements.

It should be noted that individual notice was eventually sent to all recipients on February 1 or February 17, 1976. This notice was not "timely" since it did not precede by 10 days the effective date of the cutbacks (January 1, 1976).

(b) *Notice* (Adequacy)

An additional issue concerns the adequacy of the notice that was in fact sent out to each recipient. That notice read as follows:

EFFECTIVE JANUARY 1, 1976

THE FOLLOWING ARE IMPORTANT CHANGES TO THE CARE YOU MAY RECEIVE WITH YOUR MEDICAL ASSISTANCE CARD. *PLEASE READ THEM CAREFULLY.*

DENTAL SERVICES: No changes have been made in the dental services available to you if you

are under 21 years of age. If you are 21 years of age or older, you may only receive emergency care for toothaches, infection or injury to your teeth. You may have broken dentures repaired.

PHARMACY: You must pay 50¢ for each prescription which you have a pharmacy fill. You may no longer obtain drugs which can be purchased without a prescription, however, this change does not apply to patients in skilled or intermediate care facilities as the cost of over the counter drugs is included in the facility reimbursement. These include such items as aspirin, milk of magnesia or antacids. Insulin, needles and syringes may still be obtained with your Medical Assistance card.

VISION CARE SERVICES: If you are under 21 years of age, you may receive one pair of eyeglasses and one eye examination once each year. If you are 21 years of age or older, you may receive only one pair of eyeglasses and one eye examination every two years.

MEDICAL SUPPLIES: You may only obtain needles and syringes, ostomy supplies and items for the treatment of permanent urinary incontinence. Supplies such as gauze, cotton and adhesive tape are no longer provided.

YOUR LOCAL HEALTH DEPARTMENT AND YOUR LOCAL DEPARTMENT OF SOCIAL SERVICES CAN ANSWER ANY QUESTIONS YOU MAY HAVE.

45 C.F.R. § 205.10(a)(4)(iii) indicates that notice is "adequate" if it includes:

> a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

Although the notice reproduced above clearly complies with the first requirement and arguably satisfies the third, it is completely lacking as to the second and fourth requirements.

(c) *Hearing*

Plaintiffs claim that the HEW regulations entitle them to a hearing in this case. Defendant responds by quoting 45 C.F.R. § 205.10(a)(5) which provides:

> (5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance. *A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.* (Emphasis added.)

Plaintiffs argue in response that there is a distinction between reductions resulting from "agency policy" and reductions resulting from "changes in State or Federal law." The argument is based on the history of § 205.10(a)(15). That section first appeared as a proposed regulation in 38 Fed. Reg. 980 (April 20, 1973).

> (3) An opportunity for a fair hearing before the State agency will be granted to any individual who requests a fair hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance, and who raises an issue of fact or judgment relating to the individual case, including a question of whether the State agency rules or policies were correctly applied to the facts of the particular case. *An opportunity for a fair hearing before the State agency will likewise be granted to an individual whose request raises only an issue of State agency policy, unless there is made available an alternative procedure whereby views concerning State agency policy can be communicated to officials of the State agency.* (Emphasis added.)

The present regulation was introduced in 38 Fed. Reg. 22005. Before promulgating the regulation, HEW indicated that it was intended to change the proposed regulation, a change made in response to various comments received by HEW. HEW introduced the new regulation, explained it and responded to comments in the following introductory paragraphs: (These appeared in the same Fed. Reg. edition as did the final regulation.)

> 5. *Grievance procedures in lieu of hearings on questions of law or policy.* Section 205.10(a)(5). Most of the comments in this area argued against this provision on the basis that the hearing procedure provides a viable mechanism for effecting changes in policy. Many legal aid groups pointed out that a recent *court case*[1] cast doubt on the viability of distinguishing between fact or judgment and policy or law. Those in favor stressed reduction of administrative cost.
>
> *In response to these comments and the court case, the regulations have been modified. The States may provide for group hearings on questions of policy or law. They need not provide a hearing where either State or Federal law requires automatic grant adjustments for classes of recipients. On individual requests not resulting from such a change in State or Federal law, assistance must be continued pending a hearing decision unless the hearing officer determines at the hearing that the sole issue is one of State or Federal law or policy or a change in State or Federal law.* The provision regarding a grievance system has been deleted since "expression of views" on program policy is part of legislative and rulemaking procedures. (Emphasis and footnote added.)

Based on this "legislative history," plaintiffs seek to maintain the distinction between "agency policy" and "State or Federal law requiring automatic grant

[1] Yee-Litt v. Richardson, 353 F. Supp. 996 (N.D. Cal. 1973).

adjustments." The argument is that the "policy" cases come within the general hearing requirement and that to this requirement there is only one narrow exception — reductions caused automatically by State or Federal law.

Although the regulations and comments of HEW are not examples of clarity, plaintiffs' argument must fail. First, there is no sensible way of distinguishing between "agency policy" and "State law"; when agency regulations are validly promulgated pursuant to legislative authority, they have the force of law. There is no question here that the regulations were promulgated in accordance with state law. Second, the HEW regulation (see p. 10) and the comment (see p. 11) permit but do not require the State to hold hearings on questions of law or policy. Consider the following key passages of the comment:

> On individual requests not resulting from such a change in State or Federal law, assistance must be continued pending a hearing decision unless the hearing officer determines at the hearing that the sole issue is one of State or Federal law *or policy* or a change in State or Federal law. (Emphasis added.)

This passage indicates an intent to equate state law and "policy" for purposes of granting a hearing. Finally, the final portions of the proposed regulation (p. 10) and the later comment (p. 11) must be compared:

Proposed:

> An opportunity for a fair hearing before the State agency will likewise be granted to an individual whose request raises only an issue of State agency policy, *unless there is made available an alternative procedure whereby views concerning State agency policy can be communicated to officials of the State agency.* (Emphasis added.)

Comment:

> The provision regarding a grievance system (emphasized above) has been deleted since "expression of views" on program policy is part of legislative and rulemaking procedures.

The inference to be drawn from these passages is that the grievance procedure (which could have substituted for a hearing) for state policy questions has been eliminated as superfluous, and that "state policy" questions are now subsumed under the general head "Changes in State or Federal Law."

An additional factor for consideration in the interpretation of the HEW comment (p. 11) is the "court case" to which the comment refers. *Yee-Litt v. Richardson,* 353 F. Supp. 996 (N.D. Cal. 1973). In that case a three-judge court held unconstitutional a California regulation which permitted a state official to make a determination as to whether a claimant raised "factual" or only "policy" questions, thus determining whether or not he had a right to a pre-termination hearing. The court held there was a high percentage of error in these fact-policy decisions and concluded that the distinction was unworkable. In other words, many cases labelled "policy" matters actually involved issues of fact applicable to particular claimants.

It may be argued that *Yee-Litt* lends credence to plaintiffs' position that HEW regulations are intended to distinguish between "policy questions" and "reductions resulting automatically from changes in State or Federal law." But the case seems to indicate that the reductions in the instant case should come under the latter heading and not the former. The instant reductions are not challenged by way of their application to any particular case — rather the challenged is to their wisdom as a general matter.

It follows that the "State of Federal"/"Policy" distinction is a red herring. The real distinction to be drawn is between those cases requiring adjudication of facts particular to an individual case and those cases where the only relevant facts are legislative, *i.e.*, they bear on the general wisdom of the State or Federal law.

(See the emphasized portion of 45 C.F.R. 205.10(a)(5) on p. 10). Thus, it is clear that plaintiffs do not challenge the cut-back on the basis of facts relevant to their particular cases, but rather on the basis that it is an unwise allocation of State resources. Accordingly, they have no statutory right to a hearing.

8. *The Constitutional Claims*

Plaintiffs claim that the defendant's failure to grant them notice and an opportunity to be heard violates their Fourteenth Amendment rights. The lack of notice need not be treated here since it has already been determined that the notice was statutorily inadequate.

Plaintiffs' argument that due process requires that they be given a hearing before their benefits are reduced must fail. The action reducing the benefits was a state-wide cut-back in coverage under the Medicaid program. Such cuts are accomplished by an administrative agency's exercise of its quasi-legislative powers. When exercising its quasi-judicial powers, an administrative agency must grant affected persons due process. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). In that capacity, the agency supplies a legal standard to the particular facts of one person's case. Due process requires that the one affected be permitted to challenged the factual determination. When an agency exercises its rule-making capacity, however, it is acting more as a legislature than as a court. Due process does not require a hearing for the broad class of persons affected. *See generally* K. Davis, *Administrative Law Treatise* §7.06 (1958). The case law has held this general principle applicable to cases involving public assistance programs. *See Goldberg v. Kelly, supra* at 268, n. 15; *Russo v. Kirby*, 453 F.2d 548 (2nd Cir. 1971); *Whitfield v. King*, 364 F. Supp. 1296 (M.D. Ala. 1973); *Rochester v. Ingram*, 337 F. Supp. 350, 357 (D. Del. 1972), *rev'd on other grounds, sub nom. Rochester v. Baganz*, 479 F.2d 607 (3rd Cir. 1973); *Provost v. Betit*, 326 F. Supp. 920 (D. Vt. 1971). Although some cases seem to reach a contrary result, holding that claimants

raising only "policy" questions are entitled to pre-termination hearings, *see e.g., Cardinale v. Mathews*, 399 F. Supp. 1163 (D. D.C. 1975); *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal. 1973), when read closely they stand for the proposition that a state agency cannot refuse to provide a hearing to a claimant who has raised issues of fact which arise in his particular case on the grounds that only "policy" issues are raised. These cases do not stand for the proposition that a state must grant a hearing before making across-the-board cuts where there is no question raised as to applicability to particular cases, *i.e.*, where the only question raised is the wisdom of the particular type of cut-back. *See Cardinale* at p. 1172.[2]

9. *Relief*

The question of appropriate relief is answered by the resolution of the issues set forth above. Accordingly, having determined that the notice requirements of the HEW regulations were not met, that the notice, when issued, was inadequate, and that there was no statutory or constitutional right to a hearing, there can be no injunctive relief. Plaintiffs are not entitled to have their benefits restored until a hearing is conducted. It might be argued that plaintiffs have yet to receive "adequate" notice under 45 C.F.R. §205.10(a)(4)(iii) (p. 8 above). However, as noted herein, the notice was inadequate in that it did not inform the recipients of the reasons for the action nor did it inform them of their rights, if any, to a hearing. Since the plaintiffs have no right to a hearing, it would be farcical to order benefits continued until statutorily "adequate" notice is given. Such notice would simply inform them of the reasons for the cut-back and that they have no present right to a hearing.

[2] Mothers' and Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972), straightforwardly contradicts the rule adduced above, requiring a hearing even where the only facts in dispute are "legislative facts," *i.e.*, facts which do not concern the particulars of any one case but rather concern the wisdom of the state regulation. *See Mothers'* at p. 800. This Court cannot follow the principles set forth therein.

A strong equitable argument can be made, however, that plaintiffs should be reimbursed for any non-covered expenses (covered before the cuts) incurred between January 1, 1976 and February 27, 1976 — ten days after the individual notice was mailed. This remedy would compensate plaintiffs for the only loss they have sustained and it is consistent with the purpose of advance notice articulated by the Secretary in *Rochester v. Baganz*, 479 F.2d 603, 606 (3rd Cir. 1973). This argument, cited with approval by the court, stated:

> . . . in a program designed to meet subsistence needs recipients ought to be informed in advance if their payments are to be cut for any reason, so that they may be able to plan for the cut and to the extent possible adjust to it.

Restoration of non-covered expenses (which would previously have been covered) incurred during the period beginning at the cut's effective date and ending ten days after the date of the individual notice, will cure any actual damages suffered by the plaintiffs in reliance on the old regulations.

Counsel are directed to prepare an order in accordance with the findings and conclusions set forth herein.

JOSEPH H. YOUNG,
United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
District of Maryland
Baltimore 21201

Chambers of
Joseph H. Young
United States District Judge

August 18, 1977

James E. Carbine, Esq.
Louise T. Keelty, Esq.
Dennis M. Sweeney, Esq.
Herbert Semmel, Esq.

Re: Jennings v. Solomon
Civil No. Y-75-1869
Kimble, et al. v. Solomon
Civil No. Y-76-210

Dear Counsel:

I enclose a copy of an order signed today.

I confess that I find the signing of this order as distasteful as anything I have done in my capacity as a judicial officer. However, I have reviewed the applicable law, and this action is taken reluctantly in light of the language of *Adelman v. Jordan* and my further conclusion that *Milliken v. Bradley* does not change the applicability of *Adelman* to these cases. I have considered alternative forms of relief and I am satisfied that none would stand the scrutiny of appellate review.

Very truly yours,

JOSEPH H. YOUNG,
United States District Judge.

Enc.

In The
United States District Court for the
District of Maryland

Civil No. Y-75-1869

Civil No. Y-76-210

Regina Jennings
v.
Neil Solomon, Secretary Department of Health and Mental Hygiene
and
Department of Health and Mental Hygiene, State of Maryland

Betty Kimble, Horace Lancaster and
Thelma Eaton, et al.
v.
Neil Solomon, Secretary Department of Health and Mental Hygiene of the State of Maryland

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ORDER

In accordance with the Memorandum Opinion dated November 4, 1976, and filed in the above-entitled cases, it is ORDERED:

1. That the motion of the defendant to dismiss Count I of plaintiff Jennings' complaint be, and the same is, hereby GRANTED;

2. That the motion of the defendant for summary judgment as to Count III of plaintiff Jennings' complaint be, and the same is, hereby GRANTED;

3. That the motion of the defendant to consolidate Count II of the amended complaint, in *Jennings, et al. v. Solomon, et al.*, Civil No. Y-75-1869 and *Kimble, et al. v. Solomon*, Civil No. Y-76-210 be, and the same is, hereby GRANTED;

4. That the motion of the plaintiffs for an order certifying a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure be, and the same is, hereby GRANTED; the class certified consists of all recipients of benefits under the Maryland Medical Assistance Program (Medicaid).

5. The motion of the plaintiffs for summary judgment be, and the same is, hereby GRANTED in that this Court finds that the notice requirements of the HEW regulation, 45 C.F.R. § 205.10(a)(4) were not met, and that the notice, when issued, was inadequate. As to the other claims raised by the plaintiffs, the motion for summary judgment is DENIED;

6. The motion of the defendant for summary judgment be, and the same is, hereby DENIED;

7. Plaintiffs' requests for preliminary and final injunctive relief be, and the same is, hereby DENIED;

IT IS FURTHER ORDERED:

1. That defendant shall henceforth comply with the notice requirements of 45 C.F.R. § 205.10(a)(4) when implementing across the board program revisions the effect of which is to reduce Medicaid benefits.

Dated at Baltimore, Maryland, this 18th day of August, 1977.

JOSEPH H. YOUNG,
United States District Judge.

APPENDIX C

United States Court of Appeals
For The Fourth Circuit

No. 77-2316

Betty Kimble, Horace Lancaster, Thelma Eaton, Individually and on behalf of all others similarly situated,

Appellants,

v.

Neil Solomon, Secretary of Health and Mental Hygiene of the State of Maryland,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued November 15, 1978 *Decided June 5, 1979*

Before Winter and Phillips, Circuit Judges, and Hoffman, District Judge.*

WINTER, Circuit Judge:

In this appeal, it is not disputed that the State of Maryland instituted an across-the-board reduction in Medicaid benefits without complying with federal regulations requiring individual notice to affected recipients. The only question is what relief may be given by the district court. The district court ordered the state to comply with federal notice regulations when instituting any future reductions, but reluctantly it held

* Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

that the eleventh amendment barred any further relief. We think that the eleventh amendment permits an order requiring the prospective restoration of benefits to a limited class. We therefore reverse the judgment in part and remand the case to the district court for entry of such an order.

I.

Maryland has elected to participate in a plan, popularly known as Medicaid, to provide medical assistance to the needy under title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396k. Payments on behalf of eligible recipients are made for medical services actually received. Subject to limits provided by federal law, each participating state may decide which medical services are to be included within the coverage of its Medicaid program.

When a participating state changes its law to reduce or eliminate grants for classes of recipients, it is required by federal regulations to give notice that is both "timely" and "adequate." 45 C.F.R. § 205.10(a)(4) (1978). Notice is "timely" if it is mailed at least ten days before the date on which the reduction becomes effective. *Id.* § 205.10(a)(4)(i)(A). It is "adequate" if it includes "a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued." *Id.* § 205.10(a)(4)(iii).

On November 3, 1975, the Governor of Maryland, citing a projected deficit of 9.7 million dollars in the state Medicaid budget, directed the defendant, Secretary of Health and Mental Hygiene, to reduce the extent of coverage in the program. On November 12, 1975, the Secretary published a notice in the Maryland Register proposing new regulations that would eliminate or curtail Medicaid coverage for certain types of medical

services.[1] The notice stated that a public hearing would be held on December 1, 1975, and that the new regulations would go into effect on January 1, 1976. The new regulations became final, as scheduled, effective January 1, 1976. No Notice of the reductions was sent to individual recipients, as required by the federal regulations, prior to the effective date. The state did mail a summary of the program changes to all recipients, however, between February 1 and February 17, 1976.

On February 11, 1976, this class action was brought to challenge the Medicaid reductions for failure to provide notice and a hearing as required by the due process clause of the Constitution and for failure to comply with the federal notice regulations. The named plaintiffs were three Medicaid recipients who claimed to be in need of medical services that were eliminated from coverage by the January 1, 1976 revisions, and they purported to represent a class consisting of "all recipients under the Medicaid program of Maryland." The complaint sought both reimbursement for expenditures for health care incurred since January 1 which would have been covered by Medicaid before the

[1] As stipulated by the parties, the regulations would (a) limit the coverage of non-prescription drugs to insulin, needles, and syringes and require a 50% co-payment on all prescriptions; (b) eliminate all non-emergency dental services for persons over 21 years of age; (c) limit routine podiatry services to recipients who are diabetic or who have a lower extremity vascular condition; (d) limit recipients over 21 years of age to one eye examination and one pair of eyeglasses every two years unless waived by the Department as a medical necessity, and recipients under 21 years of age to one eye examination and one pair of eyeglasses each year unless waived by the Department as a medical necessity; (e) limit inpatient hospital services for recipients to those services determined medically necessary by the Professional Standards Review Organization; (f) limit coverage of disposable medical supplies to certain ostomy and incontinent supplies, needles, and syringes, and curtail the coverage of durable medical equipment; and (g) require a physician's preauthorization for all non-ambulatory and non-emergency ambulance use.

reductions took effect and prospective restoration of the benefits for future treatments.

On November 4, 1976, the district court issued its memorandum opinion. It certified the plaintiff class and granted partial summary judgment for the plaintiffs.[2] The district court held that the state had failed to comply with the federal notice regulations by the notice published in the Maryland Register because the notice was not mailed to each recipient and it was not phrased in language that a typical recipient could possibly understand. The district court also ruled that the statements sent to recipients during February 1976 were not in compliance with these regulations because (a) they were not "timely," since they were not mailed ten days before the effective date of the reductions, and (b) they were not "adequate," since they did not state the reasons for the reductions or the circumstances under which a hearing might be obtained and assistance continued. The district court further held, however, that

[2] Relying on our decision in Blue v. Craig, 505 F.2d 830 (4 Cir. 1974), the district court determined that it had jurisdiction under 28 U.S.C. § 1343(3), without regard to the amount in controversy, over a claim that state officials are administering a Social Security program in violation of federal regulations. Since the district court's decision, however, the Supreme Court has held in Chapman v. Houston Welfare Rights Organization, ___ U.S. ___ (May 14, 1979), that the jurisdictional grant of § 1343(3) does not encompass a claim that a state welfare regulation is invalid because it conflicts with the Social Security Act.

As an alternative basis for jurisdiction, the district court determined that it had jurisdiction under § 1343(3) over plaintiffs constitutional due process claim and then asserted pendent jurisdiction over the claim of violation of the federal notice regulations. This procedure was approved by the Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974). Although plaintiffs' constitutional claim was ultimately rejected by the district court, its discussion of the issue demonstrated that the claim was not "frivolous or so insubstantial as to be beyond the jurisdiction of the District Court," *id.* at 539. *See also* Mothers' & Children's Rights Organization v. Sterrett, 467 F.2d 797 (7 Cir. 1972).

the plaintiffs had no statutory or constitutional right to a hearing prior to the reductions.[3]

Turning to the question of relief, the district court reasoned that since the notice was inadequate chiefly for its failure to inform the recipients of the opportunity for a hearing but plaintiffs had no right to a pre-reduction hearing, it would be "farcical" to require that benefits under pre-1976 state law be continued until "adequate" notice is given. The district court further stated that a "strong equitable argument" could be made for ordering that plaintiffs be reimbursed for medical treatment received between January 1, 1976 and February 26, 1976 (ten days after the last individual notice was sent) to the extent that such treatment was covered before the challenged reductions. The court directed counsel to prepare an order consistent with its opinion.

In the course of negotiations between the parties on the drafting of the proposed order, the question of the effect of the eleventh amendment on permissible relief was raised for the first time in the proceedings. After a number of communications between counsel and the district court, the court issued its order on August 18, 1977. The order required that the state comply with federal notice requirements when implementing any future across-the-board reductions in Medicaid benefits, but it denied all other relief. The order was accompanied by a letter to counsel from the district judge, which stated in part:

> I confess that I find the signing of this order as distasteful as anything I have done in my capacity as a judicial officer. However, I have reviewed the applicable law, and this action is taken reluctantly in light of the language of [Edelman v. Jordan, 415 U.S. 651 (1974)] . . . . I have considered alternative

[3] On appeal, plaintiffs do not question the correctness of this ruling.

> forms of relief and I am satisfied that none would stand the scrutiny of appellate review.[4]

Plaintiffs appeal from the order denying any further relief. They contend that the district court had the power, notwithstanding the eleventh amendment, to order a prospective restoration of Medicaid benefits until ten days after the state has sent a notice of reductions in compliance with the federal regulations. This prospective relief would not take effect until the date of entry of an injunction against the defendant (or some future date specified in the injunction) and would require the state to make payments for medical treatments received after that date which would have been covered under pre-1976 state law.[5] We agree that this relief would be appropriate and would not be prohibited by the eleventh amendment.

By its own terms, the eleventh amendment excludes from federal jurisdiction suits against a state by citizens of another state or of a foreign state, and it has long been established that the same principle bars federal suit against a state by its own citizens as well. *See e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890). It is also well established, however, that a federal litigant can in appropriate circumstances obtain federal injunctive relief against a state officer under the doctrine of *Ex Parte* Young, 209 U.S. 123 (1908). That case permitted a federal court action against the Attorney General of

[4] The substance of this letter adequately refutes the state's contention on appeal that the district court did not rely solely on the eleventh amendment and that it denied relief by balancing the equities.

[5] At oral argument before us, the question arose whether plaintiffs had requested this relief before the district court. We believe that paragraph C of the prayer for relief in the plaintiffs' complaint, asking the district court to "[e]njoin the defendant from enforcing the reduction in assistance under the Medicaid program," can fairly be read to request the same relief as plaintiffs now seek on appeal.

Minnesota to enjoin him from enforcing a state statute claimed to be unconstitutional.

In Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court made clear that the doctrine of *Ex parte* Young permits suits for prospective relief only, and that the eleventh amendment precludes retrospective relief in the nature of a monetary award against the state, even if the suit is brought against a state officer rather than the state itself. In *Edelman*, recipients under the Aid to the Aged, Blind, and Disabled program sued the director of the Illlinois Department of Public Aid for failure to observe federal time limits for the processing of applications for aid. The district court had issued an injunction requiring compliance with the federal regulations in the future and also ordering the defendant to pay eligible applicants past benefits wrongfully withheld. The Supreme Court upheld the prospective injunctive relief but reversed the order for payment of state funds. Such relief, the Court held, was retrospective only and was therefore prohibited by the eleventh amendment.

The distinction between prospective and retrospective relief was refined in Milliken v. Bradley, 433 U.S. 267 (1977). In that case, the district court had ordered the establishment of certain remedial educational programs to counteract the effects of *de jure* segregation in Detroit public schools and had directed that part of the cost of the program be paid by the State of Michigan. Even though the decree directly ordered the expenditure of state funds, the Supreme Court upheld it from eleventh amendment attack. The Court reaffirmed the doctrine of *Ex parte* Young that "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Id.* at 289. The Court explained that the order for payment of state funds was not retrospective, as it was not "a raid on the state

treasury for an accrued monetary liability." *Id.* at 290 n.22. Finally, the Court made clear that relief can be compensatory without being retrospective: "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." Id. at 290 (emphasis by the Court.)

III.

In determining what relief in the instant case is prospective and may be granted consistent with the eleventh amendment and what relief is retrospective and barred by the eleventh amendment, we begin by considering the extent of the injury to plaintiffs.[6] Maryland's failure to send "timely" and "adequate" notice of the 1976 reductions was not a mere technical or procedural default, but rather resulted in the loss to Medicaid recipients of important substantive rights. The purpose of the same notice requirement was explained by the Secretary of Health, Education and Welfare in a case involving the Aid to Families with Dependent Children program:

> The Secretary urges that even in cases of across-the-board reductions such advance notice is necessary, or at least appropriate, for the orderly administration of welfare programs. He urges that in a program designed to meet subsistence needs recipients ought to be informed in advance if their payments are to be cut for any reason, so that they may be able to plan for the cut, and to the extent possible adjust to it.

[6] The defendant has devoted much attention in his brief to the question whether the relief sought by plaintiffs is addressed to a "continuing wrong" or merely to the continuing effects of a past wrong. We think that the answer is irrelevant. As the *Edelman* and *Milliken* cases show, the proper focus of eleventh amendment scrutiny is on the nature of the relief sought, not of the wrong committed. *See also* Quern v. Jordan, ___ U.S. ___ (March 5, 1979).

Rochester v. Baganz. 479 F.2d 603, 606 (3 Cir. 1973). Thus, the mailing of an adequate and timely notice to Medicaid recipients in the instant case would have informed them that certain types of medical services would be sharply curtailed within a few days and that any recipient in need of such services should obtain them promptly, while benefits remained available. Because such notice was not given, Maryland recipients had an opportunity neither to plan for the reductions nor to the extent possible to adjust to them, because by the time the tardy notice was sent the reductions had been put into effect.

Where, as here, Maryland failed to comply with the notice regulations, it has not instituted a legally effective reduction in its Medicaid benefits. A court of equity not subject to the eleventh amendment could order expansive relief for this violation. This relief would have two components: First, retrospectively, those eligible recipients who had managed to obtain medical services despite the reductions would be paid benefits for such services in accordance with pre-1976 state law. Second, prospectively, those recipients who receive services after the court's order would be paid benefits under pre-1976 law until the state effects a legal reduction of benefits by mailing adequate and timely notice at least ten days before the effective date of the reduction.

We think that the first, retrospective component of this relief would be barred by the eleventh amendment. Although the recipients who have already received medical services are arguably entitled to benefits under pre-1976 law, Maryland's obligation to pay these benefits arose at the time the treatments were received, and the state has denied them. To require the state to make payments for these past medical services would be tantamount to "'the award of an *accured* monetary liability . . . ' which represent[s] 'retroactive payments.'" Milliken v. Bradley, 433 U.S. at 289 (quoting Edelman v. Jordan, 415 U.S. at 663-64) (emphasis

supplied by the *Milliken* Court). This was the type of relief originally proposed by the district court in its memorandum opinion of November 4, 1976 — payment of benefits for treatment *already received* between January 1, 1976 and February 27, 1976. The district court later correctly ruled that such retrospective relief may not be ordered against a state by a federal court.

By contrast, the eleventh amendment offers no impediment to the second, prospective component of relief outlined above. This prospective relief looks to the future and requires payments only for medical services received after entry of the district court's decree. Such relief would hardly constitute "the award of an accrued monetary liability." To the contrary, the state's liability for payments would not be fixed until recipients seek and receive medical services after the district court has entered its order. This is the very form of relief now proposed by plaintiffs, and the district court was incorrect in concluding that such relief was barred by the eleventh amendment.

IV.

We therefore vacate the order of the district court insofar as it denied relief other than a mandatory injunction to comply with 45 C.F.R. § 205.10(a)(4) when implementing across-the-board revision to reduce Medicaid benefits, and remand the case for entry of a decree embodying the following provisions: Maryland should be required to pay Medicaid benefits according to pre-1976 state law for medical services received by any plaintiff after the date that the district court's revised decree is entered and to give notice of the restoration of benefits by mail to members of the class entitled thereto. This prospective reinstatement of benefits shall continue until at least ten days after Maryland has mailed to each plaintiff a separate, timely and adequate notice of the reduction. Because of the unusual situation of a restoration of benefits to be followed by a termination of benefits, the district court, in the exercise

of its discretion, may conclude to order supplementary notice of the restoration by publication or otherwise. The district court, in the exercise of its discretion, may also conclude to permit Maryland to combine in the notice to be mailed to potential beneficiaries a notice of the prospective reinstatement of benefits which the required notice of reduction, in which event the period of reinstatement of benefits shall continue for ten days after *receipt* of the combined notice.

In light of the nature of the relief which the district court will order, it will also be necessary for it to redefine the class certified to receive prospective benefits. The district court certified the class of plaintiffs as "all recipients of benefits under the Maryland Medical Assistance Program (Medicaid)." For purposes of relief other than a general injunction about future notice of across-the-board reductions, this class designation is overly broad, since it would include those persons who have become eligible for Medicaid since the reductions were first instituted in 1976. We think that such persons had no right to be sent notice of the reductions, since at that time they were not affected by the reductions; and, lacking such right, they should not share in the reinstated benefits. Likewise, those persons who had received some Medicaid benefits in the past, but who were no longer eligible to receive benefits at the time that the reductions were to go into effect, had no right to a notice of the reductions, and should have no right to the reinstated benefits. For purposes of the reinstatement remedy that we prescribe, the district court should therefore redefine the class to include only those persons who were eligible for Medicaid assistance on December 22, 1975 (ten days before the reductions were to take effect) and for the ten days thereafter.

Finally, while pre-1976 state law will govern during the period of reinstatement of benefits, the eligibility of each plaintiff to receive such benefits will depend on his *current* needs. Thus, a plaintiff who has acquired enough assets since 1976 that he is no longer financially eligible for any benefits, or a plaintiff who does not require any medical services during the period of reinstatement, should not receive benefits simply because he was financially needy or required medical services in early 1976. To base the state's current Medicaid obligations on financial and medical needs as they existed in 1976 would constitute retrospective rather than prospective relief.

VACATED AND REMANDED.

HOFFMAN, District Judge, dissenting:

If *Edelman v. Jordan,* 415 U.S. 651 (1974), has any continuing vitality, it assuredly would not permit to be done indirectly what it cannot do directly. If the majority opinion in this case is good law, it would result in the complete destruction of the 1974 Supreme Court decision by devising allegedly prospective procedures for the purpose of assuring the payment of retrospective benefits. The majority cites no precedent for its action. It may be fair and equitable in a given case such as this, but to me it is a unique device to avoid the Supreme Court ruling. I would affirm the district court.

Supreme Court, U. S.
FILED
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No. 79-350

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

CHARLES R. BUCK, JR., Sc.D., SECRETARY
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OF THE STATE OF MARYLAND

Petitioner,

v.

BETTY KIMBLE, HORACE LANCASTER,
THELMA EATON, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Where the District Court found that Maryland's Secretary of Health and Mental

Hygiene had unlawfully instituted reductions in the scope of Medicaid benefits by failing to provide advance notice to Medicaid recipients as required by federal regulations, does the Eleventh Amendment prevent the District Court from ordering prospective reinstatement of benefits for approximately ten days so as to provide recipients with the opportunity for care they would have received had the required notice been given?

STATEMENT OF THE CASE

Petitioner's statement of the case requires clarification in two respects.

A. The Relief Ordered by the Court of Appeals

The Court of Appeals found that the failure to give advance notice of the reductions "was not a mere technical or procedural default, but rather resulted in the loss to Medicaid recipients of important substantive rights.... Thus, the mailing of an adequate and timely notice to Medicaid recipients would have informed them that certain types

of medical services would have to be sharply curtailed within a few days and that any recipients in need of such services should obtain them promptly, while benefits remained available." (App. 29a-30a).*/

The relief ordered provides this opportunity by ordering prospective reinstatement of benefits limited to medical services received after the district court enters its decree and continuing until ten days after Maryland gives notice of the temporary restoration. App. 32a. The temporarily restored benefits are to be provided only to those who were both Medicaid recipients when benefits were illegally reduced and who are also Medicaid recipients at the time of restoration.

B. The Obligation to Provide Notice to Medicaid Recipients Was Clearly Established Prior to the Reductions Herein

Contrary to the implications of the petition, the obligation to provide ten days

*/ References to "App." refer to the Appendix to the Petition for Certiorari.

prior written notice to all recipients of reductions in benefits was clearly stated in the federal regulations in November, 1975 when the reductions herein were proposed. 45 C.F.R. §205.10(a)(4) provides:

> (4) In cases of intended action to discontinue, terminate, suspend or reduce assistance:
>
> (i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a)(4)(ii),(iii), or (iv) of this section. Under this requirement:
>
> (A) "Timely" means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective;
>
> (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested;
>
> * * *
>
> (iii) When changes in either State or Federal law require automatic grant adjustments for classes of

> recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

Moreover, as early as 1973, the Third Circuit had held that both notice and opportunity for hearing was required by this regulation. Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973).*/ Thus, the failure of Maryland to give notice was not the result of a sudden change in law but rather the product of a deliberate or negligent omission on the part of the State.

REASONS FOR DENYING THE WRIT

1. The Prospective Temporary Reinstatement of Medicaid Benefits is Consistent with the Decisions of this Court

The three decisions of this Court, directly on point, repeatedly emphasize

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*/ The regulation applies to both the Medicaid program and the AFDC program for public assistance, the latter being involved in Rochester v. Baganz.

the crucial difference between the retroactive award of accrued monetary liability and prospective relief which may involve payment of funds from the state treasury. Edelman v. Jordan, 415 U.S. 651 (1974); Milliken v. Bradley, 433 U.S. 267 (1977); Quern v. Jordan, ___ U.S. ___, 99 S.Ct. 1139 (1979). In Milliken v. Bradley, this Court summarized Edelman as barring "'the award of an accrued monetary liability ...' which represented 'retroactive payments,'" 433 U.S. 289, but permitting a suit "to the extent it sought 'payment of state funds... as a necessary consequence of compliance in the future with a substantive federal-question determination...'" 433 U.S. at 289 (emphasis in original).

The Court of Appeals paid heed to the distinction. It noted that two forms of relief were appropriate but the Eleventh Amendment permitted only one to be awarded. The Court of Appeals rejected payment to recipients who had managed to obtain medical services despite the reductions in Medicaid benefits as inconsistent with the Eleventh

Amendment but approved prospective relief for those recipients who receive services after the district court's order on remand. App. 30a. The Court of Appeals concluded

> "By contrast, the eleventh amendment offers no impediment to the second, prospective component of relief outlined above. This prospective relief looks to the future and requires payments only for medical services received after entry of the district court's decree. Such relief would hardly constitute 'the award of an accrued monetary liability.' To the contrary, the state's liability for payments would not be fixed until recipients seek and receive medical services after the district court has entered its order."

The Court of Appeals analysis is consistent with, indeed required by, this Court's decision in Milliken v. Bradley, 433 U.S. 267 (1977). In Milliken, the Court approved a District Court order that directed an official of the State of Michigan to use state funds, in the future, to pay one-half the cost of a remedial program in the Detroit schools. The program was to benefit students who had been victimized by racial discrimination in the past. The Court stated that "the prospective-compliance exception reaffirmed by Edelman...permits

federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." 433 U.S. at 289.

Furthermore, the Court in Milliken refused to draw an artificial line between permissible and impermissible relief by distinguishing between relief that is compensatory and relief that is not. The remedial program ordered by the decree was intended to benefit "the victims of Detroit's de jure segregated system." 433 U.S. at 290. "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment." Id. So too in the case at bar, offering the opportunity to some Medicaid recipients to obtain medical services prematurely cut off does not change the fact that a decree may be framed "that operates prospectively

to bring about the delayed benefits" of the notice requirement.

The relief awarded by the Court of Appeals is, in fact, not compensatory in nature. Thousands who were eligible for Medicaid in 1976 but are no longer eligible will receive no benefit. Medicaid recipients who received no dental care when needed in January 1976 but who may not require such care now will receive no compensation. Others who somehow obtained funds or incurred liabilities in order to receive dental or other care in January 1976 will also not receive retroactive reimbursement.

2. The Prospective Relief Awarded Leaves the State the Option of Complying with the Decree Without Additional Expenditures of State Funds

The Medicaid program is both voluntary on the part of Maryland and allows the State considerable discretion in the scope of benefits awarded. Accordingly, Maryland could if it wished comply with the decree without any additional expenditures for its Medicaid program other than those already appropriated by the legislature, by simply reducing other benefits temporarily. As

the facts here show, in Maryland benefits are reduced by administrative action and no legislation is required. Of course, respondent Medicaid recipients hope and expect that the State will not choose that method of compliance with the decree, particularly since the actual amount of money involved will be less than one percent of the total Medicaid budget, see infra, p. 11. But from the standpoint of the Eleventh Amendment, the decree can be met without any additional call on the state treasury if Maryland so wishes. Prospective relief offers the state a choice of action under which the state may avoid any intrusion on its treasury as a result of the decree. Thus, it is not surprising that in similar Medicaid reduction cases, the courts have awarded prospective relief restoring benefits until compliance with notice requirements. Benton v. Rhodes, Medicare and Medicaid Guide (CCH) ¶28,025 (S.D. Oh. 1976); reversed on other grounds, 586 F.2d 1 (6th Cir. 1978); Robinson v. Maher, Medicare and Medicaid Guide (CCH) ¶27,707 (D. Conn. 1976). Cf. Indiana

State Employees Ass'n, Inc. v. Boehning, 511 F.2d 834 (7th Cir. 1975) rev'd on other grounds, 423 U.S. 6 (1975) and Assaf v. University of Texas System, 399 F. Supp. 1245 (S.D. Tex. 1975), holding that the Eleventh Amendment does not prevent an injunction continuing employment of employee discharged without hearing although an award of back pay is prohibited.

3. The Amount of Funds Involved In the Case Is Inconsequential

Although the record does not indicate the precise cost of providing the restored benefits, it does reveal that the cost is inconsequential to the state. The reductions in benefits were made in response to a nine million dollar budgetary deficit, of which $6.5 million was met by an additional appropriation and only $2.5 million by the reductions. Petition for Certiorari, p. 3. Even if the restored services were to cost nine million dollars on an annual basis, the cost for a ten day restoration would likely not exceed five hundred thousand dollars, a drop in the bucket for a Medicaid program which spent $239 million

in fiscal 1976. In addition, half the cost of the benefits will be paid by the federal reimbursement under the Medicaid program, so that in practical dollar terms this case is of no significance to the State of Maryland.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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